

**OFFICE OF TAX APPEALS**  
**STATE OF CALIFORNIA**

In the Matter of the Appeal of: ) OTA Case No. 19085170  
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**R. JOHNSON** )  
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**OPINION**

Representing the Parties:

For Appellant: R. Johnson

For Respondent: Meghan McEvilly, Tax Counsel III

For Office of Tax Appeals: William J. Stafford, Tax Counsel III

N. DANG, Administrative Law Judge: Pursuant to California Revenue and Taxation Code (R&TC) sections 18533 and 19324, R. Johnson (appellant) appeals from the action of respondent Franchise Tax Board (FTB) denying appellant's refund claim for the 2014 tax year, which is based on a request for innocent spouse relief.

Appellant waived the right to an oral hearing, and therefore, we decide the matter based on the written record.

**ISSUE**

Whether appellant is entitled to innocent spouse relief for the 2014 tax year.

**FACTUAL FINDINGS**

1. Appellant and E. Johnson (collectively, the couple) filed a joint 2014 California income tax return, reporting California adjusted gross income (AGI) of \$54,073 and claiming an overpayment, which FTB refunded. The couple also filed joint returns for the 2015 and 2016 tax years. Since then, appellant has not filed any California tax returns.
2. FTB later received information showing that the Internal Revenue Service (IRS) had adjusted the couple's 2014 federal return. Based on these adjustments, on August 17, 2017, FTB issued a Notice of Proposed Assessment (NPA) for \$308

- additional tax plus applicable interest resulting from an increase to the couple's taxable income by \$7,666 to account for the following four items: (1) appellant's interest income of \$18; (2) appellant's nonemployee compensation of \$8,081; (3) E. Johnson's taxable dividend of \$138; and (4) the allowance of a \$571 self-employment tax deduction.
3. In February 2018, the couple began living apart in separate households.
  4. After the couple failed to pay the balance due, FTB initiated collection action and imposed a collection fee.
  5. On November 9, 2018, an FTB levy of appellant's bank account satisfied the couple's outstanding balance.
  6. On January 7, 2019, appellant filed a request for innocent spouse relief for the 2014 tax year, which FTB also accepted as a refund claim for the levied amount.
  7. Appellant did not submit any supporting documents with her relief request, despite multiple letters from FTB asking that she do so.
  8. On April 19, 2019, FTB issued a Non-Requesting Taxpayer Notice to E. Johnson, informing E. Johnson of appellant's request for innocent spouse relief for the 2014 tax year.
  9. E. Johnson responded, asserting that FTB should deny appellant innocent spouse relief because appellant had knowledge of the 2014 tax liability and E. Johnson fully reimbursed appellant for the levied amount. Included in the response was a copy of a check from E. Johnson to appellant for \$1,013, dated October 27, 2018. A note on the memorandum line of the check states "taxes and tags," and the back of the check shows handwriting that indicates \$630 for taxes and \$383 for tags.
  10. On July 25, 2019, FTB issued separate Notices of Action (NOAs) to appellant and E. Johnson, denying appellant's request for innocent spouse relief for the 2014 tax year.

### DISCUSSION

When a joint return is filed by a married couple, each spouse is jointly and severally liable for the entire tax due for that tax year. (R&TC, § 19006(b).) However, an individual may be relieved of all or a portion of such liability under the "innocent spouse" relief provisions of R&TC section 18533. There are four types of innocent spouse relief available under R&TC section 18533: traditional relief under subdivision (b); a separate liability election under subdivision (c); equitable relief under subdivision (f); and federal conforming relief under

subdivision (i). As these provisions are remedial in nature, they are construed and applied liberally in favor of the individual claiming their benefits. (*Friedman v. Commissioner* (2d Cir. 1995) 53 F.3d 523, 528-529.)<sup>1</sup>

Generally, an individual claiming relief has the burden of establishing each statutory requirement by a preponderance of the evidence. (*Stevens v. Commissioner*, T.C. Memo. 1988-63; *Appeal of Dillett* (85-SBE-012) 1985 WL 15791.) Unsupported assertions are not sufficient to satisfy an individual's burden of proof. (See *Appeal of Magidow* (82-SBE-274) 1982 WL 11930.)

Appellant asserts that appellant should be relieved of liability for the couple's 2014 understatement because appellant is in a "dangerous situation" with E. Johnson who is a "control freak," and appellant had no knowledge of the items which gave rise to that understatement.

There is no evidence or assertion that the IRS granted appellant innocent spouse relief, and thus, federal conforming relief is inapplicable here. Likewise, a separate liability election is unavailable where, as here, a grant of innocent spouse relief would result in a refund or credit. (R&TC, § 18533(e)(3)(C).)

Also of particular importance is that the couple's understatement is overwhelmingly attributable to appellant's unreported income; in fact, FTB computes that only \$6 of the \$308 tax understatement is attributable to E. Johnson. Thus, a finding that appellant is entitled to either traditional or equitable relief would not excuse appellant from paying the majority portion of the liability arising from the items of income attributable to her (e.g., \$8,081 of nonemployee compensation).<sup>2</sup> (See R&TC, § 18533(b), (f); Rev. Proc. 2013-34, § 4.01(7).)

#### *I. Traditional Innocent Spouse Relief*

R&TC section 18533(b) provides for relief of an understatement of tax attributable to the erroneous items of the other individual filing the joint return when the requesting spouse meets *all* the following requirements: (1) a joint return was filed for the tax year in issue; (2) the return

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<sup>1</sup> Because the language of R&TC section 18533 pertaining to the standard for granting equitable relief is substantially similar to that of its federal counterpart (i.e., Internal Revenue Code (IRC) section 6015(f)), federal case law interpreting the federal statute is highly persuasive authority in construing the California statute. (*Douglas v. State of California* (1942) 48 Cal.App.2d 835, 838; *Rihn v. Franchise Tax Bd.* (1955) 131 Cal.App.2d 356, 360.) Federal Treasury regulations are also applied in California innocent spouse cases to the extent that such regulations do not conflict with California law. (R&TC, § 18533(g)(2).)

<sup>2</sup> Although there are several exceptions to this rule when considering equitable relief (as discussed further in footnote 3 below), none of these exceptions are applicable here.

contains an understatement of tax attributable to an erroneous item of the other spouse; (3) the requesting spouse established that in signing the return, he or she did not know of, and had no reason to know of, the understatement; (4) taking into account all facts and circumstances, it would be inequitable to hold the requesting spouse liable for the deficiency attributable to the understatement; and (5) the requesting spouse's claim for relief is timely.

The requirements of R&TC section 18533(b) are stated in the conjunctive, meaning that the failure to meet any one of the above-stated conditions renders an individual ineligible for traditional relief. In examining the record before us, we find no evidence indicating that appellant was unaware of, *and* had no reason to know of, the couple's understatement. Absent a showing of abuse or financial control, a requesting spouse has a "duty of inquiry" to ensure that a joint return is accurately filed. (*Fumitake Nishi v. Commissioner*, T.C. Memo. 2019-143; see *Kistner v. Commissioner* (11th Cir. 1994) 18 F.3d 1521, 1526.) Appellant's contentions in this matter appear to focus solely on the unsupported claim that appellant lacked knowledge of this understatement, without addressing what steps, if any, appellant took to verify the accuracy of the amounts reported on the couple's 2014 return. There is no evidence that appellant was the victim of abuse or denied access to the couple's financial information. We therefore conclude that appellant does not qualify for traditional relief.

## *II. Equitable Innocent Spouse Relief*

R&TC section 18533(f) provides that FTB may relieve a taxpayer from a tax liability if: (1) under procedures prescribed by FTB, taking into account all the facts and circumstances, it is inequitable to hold the taxpayer liable for the unpaid tax or understatement; and (2) the taxpayer does not otherwise qualify for traditional or separate liability relief. As discussed above, appellant meets the later requirement.

In considering whether, under all the facts and circumstances it would be inequitable to hold appellant liable for the understatement, FTB utilizes IRS Revenue Procedure 2013-34, which provides guidelines for the IRS to follow in deciding whether to grant equitable innocent spouse relief.

Revenue Procedure 2013-34 sets forth a three-step process for evaluating requests for equitable innocent spouse relief: (1) section 4.01 lists seven threshold conditions which must be met before IRS will consider equitable relief; (2) section 4.02 specifies the situation in which IRS will make a streamlined relief determination; and (3) section 4.03 sets forth a list of

nonexclusive factors that IRS will consider in determining whether relief should be granted should the requesting spouse not qualify for streamlined relief.

FTB admits that the seven threshold conditions set forth in section 4.01 have been satisfied,<sup>3</sup> and therefore we turn our focus to the remaining two tests for equitable relief.

*A. Streamlined Determination—Section 4.02*

Section 4.02 of Revenue Procedure 2013-34 provides that equitable relief will be granted where the following three conditions are met: (1) at the time the government makes its innocent spouse determination, the requesting spouse is divorced from the nonrequesting spouse, legally separated from the nonrequesting spouse under applicable state law, a widow or widower and is not an heir to the nonrequesting spouse's estate, or has not been a member of the same household as the nonrequesting spouse at any time during the preceding 12 months; (2) the requesting spouse establishes he or she would suffer economic hardship if relief was not granted; and (3) the requesting spouse establishes he or she did not know or have reason to know that there was an understatement or deficiency on the joint return or did not know or have reason to know as of the date the return was filed that the nonrequesting spouse would not or could not pay the tax liability at that time or within a reasonable period of time after the filing of the return.

Appellant does not qualify for streamlined relief because appellant has not shown that a denial of relief would result in economic hardship. An economic hardship exists if satisfaction of the tax liability in whole or in part will cause the requesting spouse to be unable to pay reasonable basic living expenses. Appellant has not provided any information relating to appellant's current assets, liabilities, income, and expenses, which are necessary for a

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<sup>3</sup> These are: (1) the requesting spouse filed a joint return for the taxable year for which he or she seeks relief; (2) relief is not available to him or her under traditional innocent spouse relief or separate allocation innocent spouse relief; (3) the requesting spouse applies for relief within the applicable statute of limitations for requesting equitable relief; (4) no assets were transferred between spouses as part of a fraudulent scheme by the spouses; (5) the nonrequesting spouse did not transfer disqualified assets to the requesting spouse; (6) the requesting spouse did not file the return with a fraudulent intent; and (7) unless an exception applies (e.g., attribution solely due to the operation of community property law, nominal ownership, misappropriation of funds, or abuse or fraud by the nonrequesting spouse), the income tax liability from which the requesting spouse seeks relief is attributable to an item of the nonrequesting spouse or an underpayment resulting from the nonrequesting spouse's income. (Rev. Proc. 2013-34, § 4.01(1)-(7).)

determination on this issue.<sup>4</sup> Moreover, the evidence plainly shows that E. Johnson fully reimbursed appellant for the levied amount—a fact appellant does not dispute. Thus, a denial of relief in this instance would simply prevent appellant from being reimbursed twice for the same amount, rather than inflict economic hardship on appellant.

Accordingly, we find appellant does not qualify under the streamlined procedures of section 4.02.

*B. Section 4.03 Factors*

If the threshold conditions of section 4.01 are satisfied and streamlined relief pursuant to section 4.02 is unavailable, then section 4.03 provides a list of nonexclusive factors to be weighed and considered. They include: (1) marital status; (2) economic hardship; (3) reason to know of the understatement or whether the nonrequesting spouse could or would pay the reported tax liability; (4) legal obligation arising from a divorce decree or other binding agreement; (5) significant benefit received by the requesting spouse; (6) compliance with income tax laws in subsequent tax years; and (7) mental or physical health. No single factor is determinative, the list of factors is non-exhaustive, and each factor's degree of importance varies depending on the facts and circumstances. (Rev. Proc. 2013-34, § 4.03(2).)

*1. Marital Status*

This factor will weigh in favor of relief if the requesting spouse is no longer married to the nonrequesting spouse. (Rev. Proc. 2013-34, §4.03(2)(a).) The requesting spouse is treated as being no longer married to the nonrequesting spouse if he or she has not been a member of the same household as the nonrequesting spouse during any portion of the 12-month period before the government issued its innocent spouse determination. (Rev. Proc. 2013-34, § 4.03(2)(a)(iv).)

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<sup>4</sup> This factor is determined by taking into account the requesting spouse's current income, expenses, and assets. (Rev. Proc. 2013-34, § 4.03(2)(b).) FTB will compare the requesting spouse's income to the federal poverty guidelines for the requesting spouse's family size and will determine by how much, if at all, the requesting spouse's monthly income exceeds the spouse's reasonable basic monthly living expenses. (*Ibid.*) If the requesting spouse's income is below 250 percent of the federal poverty guidelines, or if the requesting spouse's monthly income exceeds the requesting spouse's reasonable monthly living expenses by \$300 or less, then this factor will weigh in favor of relief *unless* the requesting spouse has assets out of which the requesting spouse can make payments towards the tax liability and still adequately meet the requesting spouse's reasonable basic living expenses. (*Ibid.*) If the requesting spouse's income exceeds these standards, then the taxing agency will consider all facts and circumstances in determining whether the requesting spouse would suffer economic hardship if relief is not granted. (*Ibid.*)

Here, the couple began living in separate households in February 2018, which was more than 12 months prior to the issuance of the NOAs denying appellant's request for relief. Thus, this factor favors relief.

2. Economic Hardship

If denying relief from joint and several liability will cause the requesting spouse to suffer economic hardship, this factor will weigh in favor of relief. (Rev. Proc. 2013-34, § 4.04(2)(b).) If a denial of relief will not cause the requesting spouse to suffer economic hardship, this factor will be neutral. (*Ibid.*)

For the reasons provided above in our discussion of streamlined relief, this factor is neutral.

3. Knowledge or Reason to Know

If the requesting spouse knew or had reason to know of the item giving rise to the understatement, this factor will weigh against relief.<sup>5</sup> (Rev. Proc. 2013-34, § 4.03(2)(c).) If the requesting spouse did not know and had no reason to know of the item giving rise to the understatement, this factor will weigh in favor of relief.<sup>6</sup> (*Ibid.*)

As discussed above, there is no evidence showing that appellant was unaware of, and had no reason to know of, the couple's understatement. To the contrary, we believe it likely that a cursory review of the couple's 2014 return would have revealed to appellant that the couple's reported income failed to include *appellant's* over \$8,000 in non-employee compensation, which constitutes nearly all the couple's understatement. This amount was also substantial in relation to the couple's reported AGI of \$54,073, indicating that this was not an item of income which

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<sup>5</sup> However, this factor will weigh in favor of relief, even if the requesting spouse knew or had reason to know of the items giving rise to the understatement or deficiency, if the requesting spouse was abused by the nonrequesting spouse (as described in section 4.03(2)(c)(iv)), or the nonrequesting spouse maintained control of the household finances by restricting the requesting spouse's access to financial information, and because of the abuse or financial control, the requesting spouse was not able to challenge the treatment of any items on the joint return for fear of the nonrequesting spouse's retaliation. (*Ibid.*)

<sup>6</sup> A requesting spouse has reason to know of an understatement if a reasonable person in similar circumstances would have known of the understatement. (Treas. Reg. § 1.6015-2(c).) Even if a spouse does not have reason to know of an understatement, the spouse may know facts sufficient to place him or her on notice of a possible understatement, giving rise to a duty of inquiry. (*Greer v. Commissioner* (6th Cir. 2010) 595 F.3d 338, 345, *aff'd* T.C. Memo. 2009-20.)

could have been easily overlooked. Therefore, we find appellant knew or had reason to know of the couple's understatement, and thus, this factor weighs against relief.

4. The Nonrequesting Spouse's Legal Obligation

This factor will weigh in favor of relief if the nonrequesting spouse has the sole legal obligation to pay the outstanding tax liability under a divorce decree or a separate agreement. (Rev. Proc. 2013-34, §4.03(d).) This factor will be neutral if the divorce decree or separation agreement is silent as to any obligation to pay the outstanding income tax liability. (*Ibid.*)

No agreement establishing that the couple's tax liability was the sole legal obligation of either spouse has been submitted in this matter. Therefore, this factor is neutral.

5. Significant Benefit to the Requesting Spouse

A significant benefit is any benefit in excess of normal support; for example, enjoying a lavish lifestyle as evidenced by owning luxury assets and taking expensive vacations. (Rev. Proc. 2013-34, § 4.03(e).) This factor will weigh in favor of relief if the nonrequesting spouse significantly benefited from the understatement and the requesting spouse had little or no benefit, or the nonrequesting spouse enjoyed the benefit to the requesting spouse's detriment. (Rev. Proc. 2013-34, § 4.03(e).) If the amount of unpaid tax or understatement was small such that neither spouse received a significant benefit, then this factor is neutral. (*Ibid.*) The tax court has also held that this factor favors relief if the requesting spouse received little or no benefit. (*Hollimon v. Commissioner*, T.C. Memo. 2015-157.)

There is no evidence or assertion that appellant realized a significant benefit as a result of the understatement. Accordingly, this factor favors relief.

6. Compliance with Income Tax Laws

This factor asks whether the requesting spouse has made a good faith effort to comply with the income tax laws following the taxable year or years for which the request for relief was made. (See Rev. Proc. 2013-34, § 4.03(2)(f).) If the requesting spouse is compliant for the taxable years after being divorced from the nonrequesting spouse, then this factor will weigh in favor of relief, and if not, then this factor will weigh against relief. (Rev. Proc. 2013-34, § 403(2)(f)(i).)



There is little information regarding appellant's tax compliance following the 2014 tax year. The record shows only that appellant continued to file joint returns with E. Johnson for tax years 2015 and 2016, but provides no indication as to whether there were any reporting or payment issues with those returns. There is also no information as to whether appellant was required to file for any subsequent years. Therefore, we find this factor to be neutral.

7. Mental or Physical Health

This factor weighs in favor of relief if the requesting spouse was in poor mental or physical health when the return to which the relief relates was filed or when the request for relief was made. (Rev. Proc. 2013-34, §4.03(2)(g).) Appellant has not alleged or provided evidence showing that appellant was in poor physical or mental health. Accordingly, this factor is neutral.

Analysis

In summary, two factors weigh in favor of relief, four are neutral, and one weighs against relief. A determination of relief, however, is not based on a mere tallying of these factors but on a consideration of all the facts and circumstances. (Rev. Proc. 2013-34, §§ 3.05 & 4.03(2); see, e.g., *Henson v. Commissioner*, T.C. Memo. 2012-288; *Hudgins v. Commissioner*, T.C. Memo. 2012-260.)

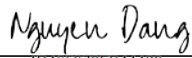
The facts here plainly indicate that appellant paid the couple's liability and was fully reimbursed for that payment by E. Johnson. Essentially, appellant has already been relieved of the financial burden associated with paying this liability. There is no justification for allowing appellant to recover this amount yet again. Based on all factors herein, including our findings that appellant has not provided evidence demonstrating economic hardship and lack of knowledge (including lack of reason to know), we conclude that it would not be inequitable to deny appellant equitable relief.

HOLDING


Appellant is not entitled to innocent spouse relief for the 2014 tax year.


DISPOSITION

FTB's action is sustained.

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Nguyen Dang  
Administrative Law Judge

We concur:

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Sheriene Anne Ridenour  
Administrative Law Judge

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Amanda Vassigh  
Administrative Law Judge

Date Issued: 7/7/2020